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**Antitrust Appraisal of Vertical
Agreements in the ASEAN Economic
Community:
Proposals for a More Harmonised
Approach
Regionalisation of Competition Law
and Policy in ASEAN**

Alison Jones

King's College London Dickson Poon School of Law
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***Antitrust Appraisal of Vertical Agreements in the ASEAN
Economic Community: Proposals for a More Harmonised
Approach***

Alison Jones

***Forthcoming in B. Ong (ed), The Regionalisation of Competition
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Abstract: In spite of the ASEAN goal of harmonising national competition policies and laws, the ASEAN Member States (AMSs) adopt an array of different approaches towards a number of procedural and substantive competition law issues, including the substantive appraisal of vertical agreements. The question of whether, and if so how, analysis of vertical agreements under the competition laws of the AMSs should be aligned has, to date, received little attention from ASEAN competition agencies. This paper notes that this is, nonetheless, a matter of considerable importance. Not only do the differences in approach adopted undermine ASEAN's stated objectives, but they are likely to be damaging competition and efficiency and inhibiting market integration.

The paper draws on practice and experience in the US and EU to consider whether, and if so how, the approach to vertical agreements under the competition law systems of the AMSs should be reformed or developed to ensure a more coherent policy which is optimal for achieving ASEAN's objectives. One issue considered is whether the EU policy towards resale price maintenance and restraints on cross-border trade should be emulated. In particular, whether a hardline approach should be adopted against vertical restraints which enable firms to partition the ASEAN market along national lines and perpetuate price differences in the AMSs, thereby undermining its single market objective.

The paper concludes that although greater harmonisation of policies towards vertical agreements might be desirable, it will be difficult to achieve within the existing national systems without some legislative changes and significant cooperation between the ASEAN competition authorities. Given the different perspectives that the separate legislative regimes reflect, debate will be required to build consensus around a more uniform approach that can effectively be implemented within each of the national systems.

Keywords: Antitrust Analysis of Vertical Agreements, Competition Law in the ASEAN Member States.

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1. INTRODUCTION

In spite of the ASEAN goal of harmonising national competition policies and laws, the ASEAN Member States (AMSs) adopt an array of different approaches towards a number of procedural and substantive competition law issues, including the substantive appraisal of vertical agreements.¹ Although the question of whether, and if so how, analysis of vertical agreements under the competition laws of the AMSs should be aligned has, to date, received little attention from ASEAN competition agencies, it is matter of considerable importance. Not only do the differences in approach adopted undermine ASEAN's stated objectives, but they create complexity for business, are likely to be making it difficult for business to exploit fully the advantages of the ASEAN single market and are creating error risks.² This Chapter consequently considers whether, and if so how, the approach to vertical agreements under the competition law systems of the ASEAN states should be reformed to ensure a more coherent policy that is optimal for achieving the single market and other objectives envisaged by ASEAN.

Section 2 commences by examining how the divergent national policies towards vertical agreements in the AMSs might be damaging competition, efficiency and market integration and why greater convergence around a harmonised framework might be desirable. Section 3 then goes on to analyse the rules and standards that have evolved to evaluate vertical restraints across the USA and EU under section 1 of the Sherman Act 1890³ and Article 101 TFEU⁴ respectively, and the factors that have influenced the development of policy in these jurisdiction. It focuses, in particular, on the EU experience where the competition law rules are incorporated within the Treaty on the Functioning of the European Union (TFEU),⁵ specifically to ensure that competition in the internal market is not distorted.⁶ Indeed, a core objective of EU competition law has been to ensure that private businesses do not jeopardise the internal market project by re-erecting barriers to the free movement of goods and services that have been, or are being, dismantled at the State level.⁷ This goal has strongly influenced the policy towards vertical (and intellectual property (IP) licensing) agreements and partly explains why certain vertical restraints, particularly territorial ones, are treated with such hostility under EU competition law.

Section 4 then considers what might be learnt from USA and EU law and how they might suggest an ASEAN policy could be developed to further the ASEAN objectives

¹ See Chap. ***.

² In particular, the risk both that certain anticompetitive vertical practices are going unchecked in some AMSs *and* that a number of procompetitive arrangements across the ASEAN region are being deterred, see further section 2.

³ Section 1 prohibits contracts etc found to be in 'unreasonable' restraint of trade, see *Standard Oil* 221 US 1 (1911), 58-60.

⁴ Article 101(1) prohibits agreements which have as their object or effect the restriction of competition, whilst Article 101(3) provides a legal exception, exempting agreements which meet its four criteria from the Article 101(1) prohibition see e.g., A. Jones and B. Sufrin, *EU Competition Law: Text, Cases and Materials* (OUP, 6th edn, 2016), Chap. 3.

⁵ See Protocol 27 (annexed to the Treaty of Lisbon) and e.g., Jones and Sufrin, *ibid*, Chap. 1.

⁶ The single market pursued by ASEAN is different in style to the one pursued in the EU, see section 2.

⁷ See Chap. ***.

and reflect the specific features and make up of those economies and their competition law systems. In particular, it considers how:

- (i) Specific rules or standards could be developed to assess vertical agreements. One issue considered is whether the EU policy towards restraints on cross-border trade should be emulated, and a hardline approach adopted against vertical restraints which enable firms to partition the ASEAN market along national lines, thereby undermining its single market objective; and
- (ii) Substantive convergence and effective enforcement could be achieved in the 'ASEAN-way' – within the different national frameworks (and in the absence of a supra-national and supreme ASEAN Economic Community (AEC) competition law system enforced by supranational institutions).

Section 5 concludes that although greater harmonisation of policies towards vertical agreements might be desirable, it will be a challenge for it to be achieved within the existing national systems without some legislative changes and significant cooperation between the ASEAN competition authorities. Given the different perspectives that the separate legislative regimes reflect, debate will be required to build consensus around a more uniform approach that can effectively be implemented within each of the national systems.

2. DIVERGENT APPROACHES TO VERTICAL AGREEMENTS IN THE ASEAN MEMBER STATES

The AEC Blueprint sets out four key objectives:⁸ (i) a single market and production base; (ii) a highly competitive economic region; (iii) a region of equitable economic development; and (iv) a region integrated into the global economy. Although it does not provide for supranational institutions but, rather, relies on cooperation to fulfil its goals, it nonetheless sets out an aspirational plan for deep regional integration which goes well beyond the elimination of border barriers to create a single market, 'encompassing also initiatives in trade facilitation (such as the alignment of standards), improving the climate for foreign investment, liberalizing services trade, and concluding new trade agreements with external partners'.⁹ Indeed, one study has estimated that, given the scope and scale of the AEC ambition (and taking into account benefits resulting from the elimination of tariffs and non-tariff measures, trade facilitation, improvements in the investment climate and from extending ASEAN's network of free trade agreements to other external partners), it is realistic to estimate gains of five per cent of ASEAN income resulting from full implementation of the plans.¹⁰

A core focus of the blue print is the single market which envisages, in particular, eliminating and removing duties, restrictions and non-tariff barriers to ASEAN trade in goods and services and facilitating freer movement of skilled labour and capital (but not, as in the EU, a customs union nor free movement of persons and capital). Reducing tariffs, non-tariff and other barriers to trade between the AMSs has the potential to bring significant welfare benefits. Although some AMSs concentrate

⁸ See http://www.asean.org/storage/2016/03/AECBP_2025r_FINAL.pdf and Chap. 1.

⁹ P.A. Petri, M.G. Plummer and F. Zhai, 'The ASEAN Economic Community: A General Equilibrium Analysis' (2012) 26(2) *Asian Economic Journal* 193.

¹⁰ *ibid* ('The example of European integration suggests that a single market created through such initiatives not only generates gains from trade based on comparative advantage, but also gives rise to new horizontal trade based on economies of scale.')

more heavily on pursuing economic welfare benefits derived from investment facilitation that increases foreign direct investment (FDI) into the liberalizing AMSs, the advantages to be gained from eliminating intra-regional tariff and non-tariff barriers to trade should not be forgotten.¹¹ Organic growth within ASEAN should, consequently, be a crucial aspect of the AEC project.

In order to create a competitive economic region, to ensure a business friendly environment and to lower non-tariff barriers to trade, the blueprint envisages the introduction of effective rules on competition.¹² The rules governing competition are considered necessary, in particular, to guarantee a level playing field and 'fair competition' for firms, improved market access and to allow ASEAN to achieve its objective of becoming a stable, competitive, innovative and dynamic region in the world, which is an attractive region for FDI.¹³

To ensure a level playing field and access to the different ASEAN national markets is ensured, it seems crucial that the AMSs' competition laws can reach and prohibit vertical agreements, which have the potential to harm competition and efficiency, inhibit competitors' access to the market (for example, through exclusive dealing arrangements which prohibit customers' from purchasing from other firms) and/or to prevent dealers from selling across borders to reach customers in other AMSs. Because, however, vertical agreements also have the potential to achieve efficiency in distribution and may facilitate penetration of new markets, however, care needs to be exercised in developing competition law rules to ensure that the mixed competitive effects of these agreements are taken into account and that procompetitive arrangements are not deterred.

A number of strategic measures have been identified in the competition sphere in order to achieve ASEAN's objectives,¹⁴ including narrowing distinctions between national competition policies and laws and cooperation to ensure effective dealing with cross-border commercial transactions.¹⁵ These goals are reflected broadly, in the ASEAN Regional Guidelines on Competition Policy.¹⁶ However, although the Guidelines on Competition Policy suggest that AMSs should 'consider prohibiting horizontal and vertical agreements between undertakings that prevent, distort or restrict competition in the AMSs' territory',¹⁷ they say nothing about how the legality

¹¹ *ibid*, section 3.

¹² Other actions are also envisaged to achieve a competitive economic region including measures to develop plans and/or harmonise rules relating to e-commerce, consumer protection, intellectual property rights (IPRs), taxation and infrastructure.

¹³ See also n. 11 and text.

¹⁴ See Chap. 1.

¹⁵ 'A unique regional competition law seems too ambitious a goal for ASEAN ..., not only because of legal differences in the AMS but also given the disparities in size, economic weight, and level of industrialization among AMS.' B Valockova, 'EU Competition Law: A Roadmap for ASEAN?' EU Centre in Singapore Working Paper no 25, November 2015, 9.

¹⁶ Available at <http://www.icao.int/sustainability/Compendium/Documents/ASEAN/ASEAN-RegionalGuidelinesonCompetitionPolicy.pdf>. See also Guidelines on Developing Core Competencies in Competition Policy and Law, available at http://www.asean-competition.org/file/post_image/Regional%20Core%20Competencies.pdf.

¹⁷ Guidelines on Competition Policy, *ibid*, section 3.2 (they identify distribution, agency and franchising agreements as examples of vertical agreements).

of vertical agreements should be evaluated and there has been relatively little focus on how these overarching aims can be achieved in relation to vertical agreements. Rather this type of harmonization and cooperation does not appear, so far, to be emerging. On the contrary, a spectrum of radically different approaches towards vertical agreements currently exist that undermine ASEAN's ambition of narrowing major distinctions in competition laws and reducing costs on business. In Singapore and Brunei, for example, the competition rules generally only reach vertical agreements concluded by dominant firms (vertical agreements are excluded from the antitrust laws governing restrictive agreements).¹⁸ In Indonesia and Malaysia, in contrast, certain vertical practices, including resale price maintenance (RPM),¹⁹ are treated with acute suspicion. In the other jurisdictions the approach to vertical agreements is less rigid, but the question of whether and if so how the rules apply to vertical agreements is not always clearly spelt out in the legislation or, yet, in jurisprudence, creating considerable uncertainty for firms; a clear analytical framework for examining such arrangements is not emerging.

These divergences seem to reflect different underpinning philosophies, which are likely to be impeding or inhibiting firms from developing and implementing ASEAN-wide distribution strategies. In addition, the categorical approach to vertical agreements adopted in some of the jurisdictions, and/or the failure to enforce the rules and elucidate the law in others, creates a lack of clarity and a risk of errors which may be inhibiting competition and deterring business from taking full advantage of the single market. In particular:

1. Overly draconian rules against, or unclear rules applicable to, vertical agreements may be deterring the conclusion and operation of agreements which provide substantial scope for efficiencies and the development by suppliers of new markets in other AMSs²⁰ (and consequently with the potential to increase competition and market integration).²¹ Distribution agreements are frequently adopted with the aim of aligning the contracting parties' interests, minimising distribution costs, of ensuring efficient and effective distribution arrangements, and, consequently, of enhancing sales of the supplier's product. In short, their ambition may be to bring a product or service to market in the most efficient manner by allowing the parties, for example, to solve a free-rider problem (to prevent free-riding on the provision by a dealer of services so inducing optimal

¹⁸ In Singapore, for example, all vertical agreements are excluded from the scope of the Competition Act section 34 prohibition, see Third Schedule para. 8. Although this decision was taken on the premise that vertical agreements have procompetitive effects that more than outweigh the potential anticompetitive effects, the Act recognises that there may be situations where this is not the case. If so, the Minister for Trade and Industry ("the Minister") may, by order, specify that the section 34 prohibition shall apply to such a vertical agreement.

¹⁹ See e.g., The Law of Republic of Indonesia Number 5 Year 1999 Concerning Prohibition of Monopolistic Practices and Unfair Business Practices, (Law No 5/1999), Art 8 (see also the treatment of tying, Art 15(2)), Malaysian Competition Act 2010, s 4 and Malaysian Competition Commission (MyCC)'s Guidelines on the Enforcement of the Chapter I prohibition (stating that it will take a strong stance against RPM). See also Thailand's Trade Competition Act, s 27.

²⁰ See e.g., the European Commission's Guidelines on Vertical Restraints (Vertical Guidelines) [2010] OJ C130/10, paras. 6, 104-107, L. Telser, 'Why Should Manufacturer's Want Fair Trade?' (1960) 3 *Journal of Law & Economics* 8 and W.S. Comanor, 'Vertical Price-fixing, Vertical Market Restraints, and the New Antitrust Policy' (1984-1985) 98 *Harvard Law Review* 983.

²¹ See further Section 3.

service provision), to open up and enter new geographic markets (by inducing a distributor to engaging in sufficient investment), to create a quality brand image, to develop a manufacturer's product, to protect a manufacturer's know-how, to enable a manufacturer to exploit economies of scale in distribution and/or to deal with capital imperfections.

2. Conversely, as most vertical agreements are out of the reach of the Singaporean and Bruneian competition authorities (unless concluded by a dominant firm), there is a risk that anticompetitive vertical agreements in these jurisdictions may be going unchecked. The fact that vertical restraints might provide positive effects does not mean that their imposition is always justified and that such restraints will inevitably result in distributive efficiency. Rather, economists are generally unwilling 'to make sweeping generalisations' and to regard them 'as *per se* beneficial for competition'²² because of the risk that some restraints²³ may, in certain circumstances, facilitate collusion between suppliers and/or dealers or foreclose other suppliers or buyers by raising barriers to entry or expansion. Vertical restraints may also create obstacles to market integration by imposing limitations on the possibilities for consumers to purchase goods or services from wherever they choose.²⁴

If greater convergence were to occur, two crucial questions are: (i) which, if any, of the spectrum of approaches adopted amongst the ASEAN states approach, would be the best to utilise to develop an effective competition policy in ASEAN?; and (ii) how could greater convergence be achieved in the existing ASEAN framework, comprising separate national competition law regimes enforced solely at the national level? These issues are considered in section 4 once the approaches that have evolved in the US and EU respectively, and their rationales, have been assessed.

3. ANALYSIS OF VERTICAL AGREEMENTS IN THE US AND THE EU

A. Rules and Standards

In the section above it is seen that vertical agreements have the potential, depending on the environment, to produce both anti- and procompetitive effects. In determining how to analyse vertical (and other) agreements under competition laws, an important question is how to balance accuracy (based on widely accepted economic principles) with administrability, consistency, objectivity and transparency,²⁵ and whether to apply more complex standards²⁶ (requiring detailed analysis of the conduct at issue in

²² European Commission, Green Paper on Vertical Restraints in EC Competition Policy, COM(96) 721, para. 54.

²³ Particularly, resale price maintenance (RPM) and territorial restraints, see further section 3. For a full discussion of the treatment of RPM and territorial restraints in the US and EU respectively, see e.g., B. Jedličková, *Resale Price Maintenance and Vertical Territorial Restrictions: Theory and Practice in EU Competition Law and US Antitrust Law* (Edward Elgar, 2016).

²⁴ See especially the Vertical Guidelines, para. 100.

²⁵ See, e.g., OECD Policy Roundtables: Resale Price Maintenance (2008), available at <<http://www.oecd.org/daf/competition/43835526.pdf>>.

²⁶ Conducting such a detailed assessment in every case is likely to impose too high a burden on firms, competition agencies (and other claimants) and courts, creating a risk both that procompetitive agreements will be deterred and too little enforcement/condemnation of harmful agreements will occur, see e.g., M. Bennett, A. Fletcher, E. Giovannetti and D. Stallibrass, 'Resale Price Maintenance: Explaining the Controversy, and Small Steps Towards a More Nuanced Policy'

the legal and economic context in which it occurs), or simpler bright line rules²⁷ (which are easier and less costly to apply by decision-takers and business, provide greater clarity and legal certainty than more amorphous standards, but, generally, create greater risk of error). Many antitrust systems accept that agreements should be sorted into categories for different types of antitrust appraisal. For example, they may:

- Apply, for procedural economy reasons, *rules or presumptions against agreements that are very likely to cause anticompetitive effects* and are unlikely to have offsetting benefits. Such agreements, identified through economic consensus or following practical experience of their effects, may be prohibited ‘*per se*’ (an absolute prohibition, as in the US) or be *presumed* to be incompatible with the competition law rules unless the parties can demonstrate otherwise (as is the case for ‘object’ restraints in the EU);
- Apply *rules or presumptions in favour of agreements which are very unlikely to cause anticompetitive effects*—in some systems (including the EU), such agreements may benefit from a safe harbour; and
- Reserve *more detailed, multi-faceted and complex analysis for agreements whose effects are more ambiguous* and which consequently require closer individual scrutiny of the anticompetitive and procompetitive effects (described as a ‘rule of reason’ analysis in the US or an effects based analysis in the EU (conducted under Article 101(1) and Article 101(3) respectively)).

A controversial issue is when, and how often, each category should be utilised.

B. A Move Away from Categorical Analysis in the US

i. The Rise of the Rule of Reason

In the US, since it has been accepted that the Sherman Act pursues a consumer welfare objective²⁸ there has been a concern that categories of antitrust analysis adopted when interpreting section 1 Sherman Act should not become conclusions, displacing the fact-specific analysis in which antitrust law is supposed to be engaging.²⁹ Indeed, because of the difficulties and contradictions that can arise from categorical analysis, the line between the *per se* rule and the rule of reason, utilised in determining whether an agreement is in unreasonable restraint of trade, has become increasingly blurred. Not only have the circumstances in which the rule of *per se* illegality applies been dramatically narrowed, but recognizing the inherent uncertainties, difficulties and cost involved in full (or plenary) rule of reason analysis, ‘intermediate’ categories of analysis have been developed or discussed as alternative methods of examining the competitive significance of any contract. The courts have backed away from the two fixed categories towards a continuum.

(2011) 33 *Fordham International Law Journal* 1278, 1281-1282. This may be a particular concern for ASEAN, see section 4 below.

²⁷ It is necessary to consider whether an approach which may sometimes condemn legitimate business practices (false positives or ‘Type 1’ errors) and so potentially chill procompetitive conduct is a lesser or greater evil than one which may sometimes allow anticompetitive practices to escape antitrust prohibitions (false negatives or ‘Type 2’ errors).

²⁸ In both *Reiter v. Sonotone Corp.*, 442 US 330, 343 (1979) and *NCAA v. Board of Regents of Univ. of Okla.*, 468 US 85 (1984), the Supreme Court accepted that the Sherman Act is designed as a ‘consumer welfare prescription.’

²⁹ M.A. Lemley and C.R. Leslie, ‘Categorical Analysis in Antitrust Jurisprudence’ (2008) 93 *Iowa Law Review* 1207.

Rather than focusing upon the category to which a particular restraint should be assigned, . . . the essential inquiry is “whether . . . the challenged restraint enhances competition.” . . . In order to make that determination, a court must make “an enquiry meet for the case, looking to the circumstance, details, and logic of the restraint,” . . . which in some cases may not require a full-blown market analysis.³⁰

There has, therefore, been a sea change - a shift from substantial reliance on rules based on form to more nuanced standards grounded in economics and away from a ‘dichotomous approach—under which every restraint of trade is either unlawful *per se* and not susceptible to justification, or subject to full-blown rule-of-reason analysis—toward one in which the extent of the inquiry is tailored to the suspect conduct in each case’.³¹

This transformation has had a significant impact on the antitrust analysis conducted in relation to vertical agreements. In a series of landmark cases dealing with vertical intra-brand restraints, restraints which restrict competition between distributors of a particular supplier’s brand,³² *Continental TV, Inc v GTE Sylvania*,³³ *State Oil v Khan*,³⁴ and *Leegin Creative Leather Products Inc v PSKS, Inc (Leegin)*,³⁵ the Supreme Court stressed that as:

- (i) per se rules are appropriate only for manifestly anticompetitive conduct – agreements having, or likely to have, a ‘pernicious effect on competition’ and which are lacking ‘any redeeming virtue’; and
- (ii) the market impact of vertical intra-brand restrictions are complex because of their ability simultaneously to reduce intra-brand competition and to stimulate inter-brand competition - the primary concern of antitrust law³⁶ - and to bring about distribution efficiencies;

any anticompetitive effects resulting from such a restraint should be analysed under the rule of reason.³⁷ For example, the majority of the Supreme Court in *Leegin* concluded that because the economics literature was ‘replete’ with procompetitive justifications for a manufacture’s use of RPM, the per se rule, which is confined to

³⁰ *Polygram Holding, Inc. v. Federal Trade Commission* 416 F.3d 29, 35 (DC Cir. 2005).

³¹ *Ibid*, 33–34.

³² They may be price restraints (e.g., fixing the minimum or maximum prices at which the distributor can sell the products) or non-price restraints (e.g., limiting competition between distributors by requiring them to sell from a specified location, by granting distributors exclusive sales territories, by imposing restraints on the area within which, or the customers to whom, a distributor can resell the contract product or by limiting the type or number of outlets in which the supplier’s products are sold). Frequently, such restraints may be accompanied by obligations on distributors to make specific services available to customers or to engage in active promotion of the products.

³³ 433 US 36 (1977). Exclusive dealing arrangements, in contrast, have always been analysed under the rule of reason, see *Tampa Electric Co. v. Nashville Coal Co.* 365 US 320 (1961)

³⁴ 522 US 3 (1997).

³⁵ 551 US 887 (2007).

³⁶ *ibid*, fn. 19.

³⁷ To determine whether it ‘is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition’, *Board of Trade of the City of Chicago v. United States* 246 US 231, 238–39

restraints that always, or almost always, tend to restrict competition and decrease competition, should not be applied.³⁸

Rule of reason analysis in the US requires, as its starting point, the plaintiff (or claimant) to establish that the restraint or agreement has had, or is likely to have, substantially adverse,³⁹ or significant,⁴⁰ anticompetitive effects.⁴¹ Only if this is done does the burden pass to the defendant to prove that the restraint or agreement achieves, or is likely to achieve, procompetitive benefits, in particular, the creation of efficiencies in the operation of a market or the provision of goods and services. If established, then it falls to the plaintiff to show either that: the conduct is not reasonably necessary to achieve the stated object (there are reasonably less restrictive alternatives); or the anticompetitive effects outweigh the procompetitive effects for which the restraint is reasonably necessary.

ii. Challenges

An acute concern with the US rule of reason framework is that it does not make it easy for courts to ‘separate the beneficial sheep from the antitrust goats’.⁴² Although courts have sought to give its amorphous form greater structure, a fear is that, as well as creating uncertainty for firms seeking to comply with it, it creates significant barriers for claimants (especially ‘private claimants’) who have to discharge the initial burden of demonstrating that an agreement has had, or is likely to have, substantial anticompetitive effects;⁴³

‘it has become something of a commonplace that rule of reason antitrust violations are almost impossible to prove, particularly in private plaintiff actions’.⁴⁴

The challenge therefore is for trial courts to create a litigation structure which makes ‘rule of reason analysis’ transparent to business and workable so that anticompetitive restraints can be identified and eliminated under it (thereby ensuring that vertical practices, including RPM, are not de facto legalised). As Justice Kennedy stated in *Leegin* courts can ‘devise rules over time for offering proof, or even presumptions where justified, to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote procompetitive ones.’⁴⁵ Given, however,

³⁸ Tying is now the only vertical restraint that is treated with greater suspicion. This conduct is analysed under an ‘atypical’ form of the per se rule which only applies if certain conditions are satisfied (including proof of market power in the tying product market), see *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 US 2, 27 (1984).

³⁹ *United States v. Arnold, Schwinn & Co.* 338 US 365 (1967) (overruled in *Sylvania* on other grounds).

⁴⁰ *United States v. Topco Associates* 405 US 596, 606 (1972).

⁴¹ The inquiry focuses on allocative efficiency, whether or not the agreement has or will enable or facilitate the exercise of market power.

⁴² See Justice Breyer, in *Leegin* 551 US 887 (2007).

⁴³ Complaints about vertical agreements are likely to be struck out by a court at an early stage of the proceedings, if market shares are not sufficiently high to indicate that the defendant(s) has market power and so is able to act anticompetitively and to injure competition, see n. 109 and text.

⁴⁴ H. Hovenkamp, *The Antitrust Enterprise: Principle and Execution* (Harvard, 2005), 8.

⁴⁵ Justice Kennedy in *Leegin* 551 US 877 (2007). He considered that three factors should be particularly important to the inquiry in RPM cases: (1) the number of manufacturers making use of the practice; (2) the source of the restraint (harm to competition would be more likely to arise if

that relatively few vertical cases reach final judgment on the substance, a clear picture of how the litigation structure works is not emerging. In particular, as the federal antitrust agencies have not brought vertical cases under section 1 in recent years, they have become rather disengaged from policy making in this sphere.

C. Brighter Line Rules in the EU

i. Background

The approach in the US, contrasts starkly with that existing in the EU. In the EU less emphasis in vertical cases is placed on conducting a full effects analysis and greater reliance is placed on brighter line rules: in the form of both presumptions of illegality *and* legality. This position has resulted from two core factors/ historic features of the system explored in greater detail in sections ii-iv below:

- First, the interpretation given to the concept of a ‘restriction’ of competition within the meaning of Article 101(1), influenced by ordoliberal⁴⁶ (in the past at least) and single market⁴⁷ ideals, has resulted in a relatively broad category of vertical agreements being found to restrict competition within the meaning of Article 101(1) – including some which are assumed to restrict competition. Agreements infringing Article 101(1) are prohibited unless excepted from the prohibition by Article 101(3);
- Second, the broad construal of Article 101(1), combined with the enforcement system that existed pre-2004 under which the Commission had the exclusive right to grant exemption under Article 101(3), created the pressing need for group ‘exemptions’, exempting categories of agreements from the Article 101(1) prohibition. Although the Commission’s exclusive right to adjudicate individually on Article 101(3) has been removed and the Commission has sought to modernise and rationalise the interpretation of Article 101(1) against the backdrop of a consumer welfare objective,⁴⁸ block exemptions still remain a core feature of the EU system and operate as a ‘safe harbour’ for a swathe of vertical agreements.

ii. Restrictions of Competition by Object: Agreements that are Presumptively Illegal?

Article 101(1) prohibits an agreement if *either* its object *or* its effect is to restrict competition. An agreement whose object or precise purpose⁴⁹ ‘reveals in itself a sufficient degree of harm to competition law’,⁵⁰ or a ‘sufficiently deleterious impact

RPM were introduced as a result of retailer pressure); and (3) whether the manufacturer or retailer has market power. See also speech of then Assistant Attorney General C. Varney, Antitrust Federalism: Enhancing Federal/State Cooperation, Columbia Law School State Attorneys General Program, 7 October 2009.

⁴⁶ See n. 70 and text.

⁴⁷ See further section 3.D.

⁴⁸ C.E. Mosso, ‘The Contribution of Merger Control to the Definition of Harm to Competition’, GCLC Conference, Brussels, February 2016, 4 ‘This more economic approach was essentially about taking better account of market power in the assessment of a given practice. That meant recognising that some vertical restraints were no longer hardcore (for example passive sales into another distributor’s territory), and that non-block-exempted vertical restraints should be assessed in light of the parties’ market power on their respective markets’.

⁴⁹ Taking account of its clauses and the legal and economic context in which it operates, Case C-501/06 P, *GlaxoSmithKline Services Unlimited (GSK) v. Commission*, [2009] ECR I-9291, para. 58.

⁵⁰ Case C-67/13P, *Groupement des Cartes Bancaires v. Commission* EU:C:2014:2204, para. 57

on competition',⁵¹ is *assumed* to restrict competition and to infringe Article 101(1); no assessment of anticompetitive effects is required or permitted (whether to prove or disprove the existence of actual restrictive effects).⁵² Only if the object of the agreement is not found to restrict competition is it necessary to consider whether that is its effect.

An established line of cases make it clear that, although not concluded between competitors but providers of complementary goods and services, a category of vertical agreements are ordinarily⁵³ considered to be restrictive of competition by object,⁵⁴ including those which:

- involve price fixing (RPM),⁵⁵
- confer absolute territorial protection (ATP) on a distributor (or otherwise aimed at partitioning national markets or limiting parallel trade);⁵⁶ or
- ban online selling (which reduces the ability of a distributor to sell outside its territory, see *Pierre Fabre*⁵⁷);

Even though, the Court has consistently stressed in its case-law that the object of an agreement can be identified only through an analysis of both its content and the economic and legal context in which it operates it has not, save for in the most exceptional circumstances,⁵⁸ been willing to accept that the overarching objective pursued by an agreement incorporating such severe restraints is not to restrict competition. Rather, as is illustrated by the case of *Établissements Consten S.à.R.L. & Grundig-Verkaufs-GmbH v Commission (Consten and Grundig)*,⁵⁹ in these cases the Court tends to focus on the restraints imposed and simply assumes that they are disproportionate to any objective pursued and that their object is to divide the internal market on territorial lines and to restrict competition. In this case the Court of Justice thus rejected the parties' argument that the vertical sole distributorship agreement, incorporating clauses which sheltered the exclusive distributor from all intra-brand competition in France and conferring ATP upon it, was necessary to prevent freeriding and to encourage competition between similar products of different makes

⁵¹ Case 56/65, *STM* [1966] ECR 235, 249.

⁵² Case C-286/13 P, *Dole* EU:C:2015:184, paras. 111–135, Case C-8/08, *T-Mobile* [2009] ECR I-4529, para. 31.

⁵³ See n. 58 and text.

⁵⁴ The category of object restraints is not closed, see n. 114 and text.

⁵⁵ See n. 97 and text.

⁵⁶ See e.g., COMP/28.282, *The Distillers Company Ltd* [1978] OJ L50/16, Case 30/78, *Distillers Company v. Commission* [1980] ECR 2229, COMP/30.228, *Distillers Company plc (Red Label)* [1983] OJ C245/3; Case T-77/92, *Parker Pen v. Commission* [1994] ECR II-549 COMP/35.918, *JCB* [2002] OJ L69/1, this aspect of the decision upheld, Case T-67/01, *JCB Service v. Commission* [2004] ECR II-49, *aff'd* Case C-167/04 P, *JCB Service v. Commission* [2006] ECR I-8935, COMP/37.975, *Yamaha* 16 July 2003 and COMP/36.623, 36.820 and COMP/37.725, *Peugeot* [2005] OJ L173/49, *aff'd* (but fine reduced) Case T-450/05, *Peugeot v. Commission* [2009] ECR II-2533.

⁵⁷ Case C-439/09, EU:C:2011:277, see n. 104 and text.

⁵⁸ See e.g., Case 27/87, *Erauw-Jacquéry Sprl v. La Hesbignonne Société Coopérative* [1988] ECR 1919, Case 62/79, *Coditel v. Ciné Vog Films (Coditel I)* [1980] ECR 881.

⁵⁹ Cases 56 and 58/64, [1966] ECR 299. See also, e.g., Case C-501/06 P, *GlaxoSmithKline Services Unlimited v. Commission* [2009] ECR I-9291, para. 61.

(inter-brand competition). Instead, focussing on the mechanism the parties adopted to achieve their objective – the isolation of the French market – the Court held that clauses which result in the segregation of a national market, and/or in maintaining separate national markets, were liable to have as their *object* the restriction of competition.

Although agreements incorporating object restraints are not illegal per se, they are strongly discouraged. Indeed, the Commission states that they are *presumed not* to satisfy the conditions of Article 101(3)⁶⁰ and to be incompatible with Article 101 (the Commission equates object restraints with ‘hardcore’ restraints identified in its block exemptions and guidelines and which prevent the safe harbour of the block exemption from applying). Parties to such agreements thus face an uphill and uncertain struggle to establish that such individual agreements meet the Article 101(3) criteria even if they perceive them to be helpful, or even indispensable, to the efficient distribution of their products or services. As (i) there is little guidance as to when agreements incorporating object restraints may satisfy the Article 101(3) criteria in practice,⁶¹ (ii) it is unclear how benefits raised under Article 101(3) can be weighed against anticompetitive effects which have only been assumed and not established under Article 101(1), and (iii) serious consequences frequently follow where a competition agency uncovers agreements incorporating object restrictions, parties perceive these restraints to be prohibited and risky and generally seek to avoid using them. The Commission (see for example *VW*,⁶² *Nintendo*⁶³ and *Yamaha*,⁶⁴ *JCB*,⁶⁵ *Volkswagen*⁶⁶

⁶⁰ The Commission’s view is that provisions so severely restricting rivalry between firms are unlikely to satisfy the terms of Article 101(3) because agreements of this nature (a) generally fail to create objective economic benefits, (b) do not benefit consumers and/ or (c) are unlikely to be considered indispensable to the attainment of any efficiencies created by the agreement in question (efficiencies generated can generally be achieved by less restrictive means). See e.g., Guidelines on the application of Article 81(3) [now 101(3)] [2004] OJ C 101/97, paras 46, 79, 105.

⁶¹ Indeed a flurry of non-infringement decisions providing clear guidance on the application of Article 101(3) to agreements incorporating ‘object’ restraints seems most unlikely. Not only are NCAs not permitted to adopt non-infringement decisions, (see Case C-375/09, *Tele2Polyska* [2011] ECR I-3055) but it seems improbable that the Commission will wish, or be able, to dedicate resources to adopting this kind of decision. In practice therefore NCAs may deal with RPM and ATP which they consider to be ‘unproblematic’ from a competition perspective by deciding not to prioritise it for enforcement.

⁶² COMP/35.733, *Volkswagen* [1998] OJ L124/60, Case T-62/98, *Volkswagen AG v. Commission* [2000] ECR II-2707 (fine reduced), *aff’d* Case C-338/00 P, *Volkswagen AG v. Commission* [2003] ECR I-9189.

⁶³ COMP/35.706 and 36.321, [2003] OJ L255/33, *aff’d* (but fines reduced), Case T-12/03, *Itochu v. Commission* [2009] ECR II-909 and Case T-13/03, *Nintendo and Nintendo of Europe v. Commission* [2009] ECR II-975, Case C-260/09 P, *Activision Blizzard Germany GmbH v. Commission* EU:C:2011:62. See also COMP/39.154, *Apple/iTunes* 18 March 2008.

⁶⁴ COMP/37.975, *Yamaha* 16 July 2003.

⁶⁵ COMP/35.918, [2002] OJ L691, annulled on appeal, Case T-67/01, *JCB Service v. Commission* [2004] ECR II-49, para. 130 (this finding was not challenged before the Court of Justice, which broadly upheld the judgment of the GC, Case C-167/04 P, *JCB Service v. Commission* [2006] ECR I-8935).

⁶⁶ COMP/36.693, [2001] OJ L262/14 (imposing a fine of €30.96 million on Volkswagen), annulled on appeal Case T-208/01, *Volkswagen v. Commission* [2003] ECR II-5141, *aff’d* Case C-74/04 P, [2006] ECR I-6585, *aff’d* Case C-74/04 P, [2006] ECR I-6585

and Peugeot⁶⁷), as well as some National Competition Authorities of the EUMSs (NCAs), have fined firms that incorporate price, territorial restraints or other restraints on online selling within their distribution agreements.

iii. Other Agreements: Effects Analysis and Safe Harbours

Where the object of an agreement is not to restrict competition it will not infringe Article 101(1) unless demonstrated to have appreciable restrictive effects. Some judgments of the EU courts, for example, the CJ's judgment in *Delimitis*,⁶⁸ support the view that the Article 101(1) inquiry must focus on the important question whether or not the agreement, alone or in conjunction with a network of similar agreements, would be likely to have an appreciable impact on the parameters of competition and allow the parties to exercise market power through a restriction of inter-brand competition.⁶⁹ In this case the Court, when setting out guidance for a national court as to how to assess the compatibility with Article 101(1) of a beer supply agreement obliging a café proprietor to purchase most of its beer requirements from the brewer, stressed the importance of assessing whether the agreement appreciably contributed to a foreclosure of access to the market. This required the relevant market to be defined and an assessment made of whether there was a concrete possibility for new competitors to penetrate the market or existing competitors to expand.

In other cases, involving restraints on intra-brand competition, weight has been attached to the importance of the structure of competition and undistorted competition in all market segments (including the distributor level)⁷⁰ and the wider objective of achieving an integrated internal market. This case-law reflects a suspicion of restraints on rivalry between a supplier's dealers and a concern that they might limit cross-border trade and perpetuate price differences in the EU Member States (EUMS). Consequently, many vertical intra-brand restraints even if not restrictive by object have been deemed to restrict competition unless necessary:

- to facilitate the penetration of a new market by an undertaking through the prevention of free riding on a dealer's marketing and promotion efforts (see, for example, *Société Technique Minière v Maschinenbau Ulm GmbH (STM)*;⁷¹
- to encourage non-price competition between dealers (see, for example, *Metro-SB-Grossmärkte GmbH v Commission (Metro I)*⁷²); or

⁶⁷ See COMP/36.623, 36.820, and 37.275, *Peugeot* [2006] OJ L173/20..

⁶⁸ Case C-234/89, *Delimitis v. Henninger Bräu* [1991] ECR I-935.

⁶⁹ This judgment provides support for the Commission's conclusion that in order to establish whether an agreement has a restrictive effect on competition it is necessary to determine if it affects inter-brand competition i.e., that it affects 'actual or potential competition to such an extent that on the relevant market negative effects on prices, output, innovation or the variety or quality of goods and services can be expected with a reasonable degree of probability' and, its promise to adopt an economic approach in its application of Article 101 and focus its inquiry on the market power of the undertakings concerned.

⁷⁰ They thus appear to attach importance of the process of competition as a mechanism not simply for achieving consumer welfare and efficiency, but for ensuring the freedom to conduct a business and equal and undistorted access to the market which will result in variety and safeguard consumer choice, see e.g., P. Behrens, 'The Ordoliberal Concept of "Abuse" of a Dominant Position and its Impact on Article 102 TFEU' in P. Nihoul and I. Takahashi, *Abuse Regulation in Competition Law*, Proceedings of the 10th ASCOLA Conference (2015).

⁷¹ Case 56/65, [1966] ECR 235.

⁷² Case 26/76, [1977] ECR 1875, para. 21.

- to the commercial success of a franchise agreement (*Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis* (*Pronuptia*)⁷³).

This analysis is not so easy to fit within what is conventionally considered to be an antitrust effects analysis, involving an inquiry as to whether the agreement affects ‘actual or potential competition to such an extent that on the relevant market negative effects on prices, output, innovation or the variety or quality of goods and services can be expected with a reasonable degree of probability’.⁷⁴ Rather, the Court tends to assume that restraints on the dealer’s conduct in the agreement are restrictive of competition unless objectively necessary and proportionate to a legitimate aim.⁷⁵ As this methodology does not set out clear criteria for determining objective necessity, or require any ‘identification of how far the ... measure impacts upon intra or inter-brand competition’, it seems to frustrate ‘the more economics-based revolution in antitrust’.⁷⁶ It also fuels the lack of clarity as to how effects analysis is to be conducted and, consequently, the need for safe harbours that side-steps it.

Firms are likely, therefore, where possible to seek to circumvent the need for Article 101(1) (and Article 101(3)) analysis and ensure the compatibility of their agreements with Article 101 by relying on one of two safe harbours that exist:

- Agreements that are concluded between undertakings which have a weak position in the market and which do not incorporate ‘object’ restrictions,⁷⁷ fall outside of the scope of Article 101(1) where their impact on competition is *de minimis* (they do not have a significant, or appreciable, effect on competition (the restriction on competition is *de minimis*).⁷⁸ In the context of vertical agreements, the doctrine is likely to apply to firms whose market shares do not exceed fifteen per cent;⁷⁹ or
- Agreements that are concluded between parties whose market shares do not exceed thirty per cent and which do not contain ‘hardcore’ restraints (specified in the block exemption itself) may benefit from the Verticals block exemption (the Verticals Regulation). The benefit of this Regulation, which is directly applicable, can only be withdrawn prospectively.⁸⁰ Consequently, it operates as an important

⁷³ Case 161/84, [1986] ECR 353.

⁷⁴ Guidelines on the application of Article 81(3) [now Article 101(3)] of the Treaty (the Article 101(3) Guidelines) [2004] OJ C101/97, para. 24. This could be because the agreement restricts actual or potential competition between the parties or between any one of the parties and third parties that could have existed absent the agreement, paras. 25-26.

⁷⁵ Case 161/84, *Pronuptia de Paris v. Schillgallis* [1986] ECR 353, para. 15.

⁷⁶ G. Monti, ‘Restraints on Selective Distribution Agreements’ (2013) 36 *World Competition* 489.

⁷⁷ Case C-226/11, *Expedia Inc. v. Autorité de la concurrence* EU:C:2012:795. Because of the uncertainty surrounding the question of what constitutes an object restraint, the Competition Directorate of the Commission (DGComp) published a Staff Working Document on restrictions of competition by object, SWD(2014) 198 final.

⁷⁸ Case 5/69, *Völk v. Vervaecke* [1969] ECR 295.

⁷⁹ Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (*De Minimis* Notice), C(2014) 4136 final.

⁸⁰ Reg. 1/2003 [2003] OJ L1/1, Arts 29(1)(2) and Reg. 330/2010 [2010] OJ L, recital 15 (see also Art. 6). Where the block exemption appears to exempt an agreement which is problematic, the Commission or NCA have to withdraw its benefit from the agreement which is valid and compatible until then (consequently no infringement decision of fine for breach is possible).

mechanism for authorising a large group of vertical agreements whose efficiencies are presumed to offset any anticompetitive effects.

iv. Challenges

Although the system that has developed under Article 101 provides considerable legal certainty to firms entering into vertical agreements, problems do nonetheless arise from it. Not only does it create error risks – in particular the strict stance against ‘object’ and ‘hard-core’ restraints creates a possibility of that agreements designed to ensure efficient distribution across the EU will be deterred (Type I errors)⁸¹ – but it means that relatively few cases exist in which a full effects based analysis of a vertical agreement is conducted. Rather, because most competition agency decisions⁸² involving vertical agreements have involved object infringements⁸³ and firms will where possible seek to rely on the safe harbour of the block exemption, guidance is limited on the question of how it is determined whether a vertical agreement has *as its effect* the appreciable restriction of competition and/ or whether the agreement satisfies the four conditions of Article 101(3). In particular it is unclear when concerns manifest in the jurisprudence about restraints on rivalry and internal market integration, prevail over analysis based on an assessment of the impact of the conduct on economic efficiency and the welfare of consumers in the EU.

The lack of a clear framework for assessment has been particularly problematic as cases have arisen in relation to new vertical models of distribution emerging on online markets and platforms. Many of these practices are not dealt with in detail in the Commission’s Vertical Guidelines and a clear picture is not emerging as to how EU competition law governs them. Although, a number of NCAs have scrutinised these types of agreement (for example the use of most favoured national clauses (MFNs)⁸⁴ in contracts between hotels and online travel agents (‘OTA’s, including Hotel Reservation Service (‘HRS’), Booking.com and Expedia)⁸⁵), the Commission has only more recently started to take a keen interest in online distribution arrangements, focusing on those which may be preventing cross-border e-commerce in the EU.⁸⁶

⁸¹ The application of the broad Verticals block exemption could in exceptional circumstances authorise anticompetitive agreements (unless and until withdrawn), see n. 80.

⁸² As the Commission has not adopted a vertical decision since 2005 (COMP/36.623, 36.820, and 37.275, *Peugeot* [2006] OJ L173/20) recent cases have mainly been occurring at the national level (the German Federal Cartel Office (FCO), in particular, has been active in enforcement in this area).

⁸³ And since the notification and exemption procedure was abolished, no non-infringement decisions have been adopted.

⁸⁴ Obliging hotels to commit not to offer lower rates or better conditions/ availability either itself, or on other platforms, to those offered on the OTA’s platform.

⁸⁵ These were examined by a number of NCAs which struggled to act consistently. For example, the German NCA (the Bundeskartellamt, or Federal Cartel Office) adopted decisions finding both that HRS’ and Booking.com’s MFNs infringed competition law (both German and EU), continuing proceedings against the latter, even after other NCAs, including the French, Italian, and Swedish authorities, ended proceedings by accepting commitments from Booking.com, coordinated within the forum of the ECN, see generally N Varona and A Hernandez Canales, ‘Online Hotel Booking’, *CPI Antitrust Chronicle* May 2015.

⁸⁶ The Commission is in the process both of conducting an e-commerce sector inquiry C(2015) 3026 final and investigating geo-blocking practices, that is whether restrictions preventing cross-border access to online pay-TV services, or satellite pay-TV services, incorporated in agreements

D. Rationale: Policy Underpinning the US and EU Approaches

The question of how vertical restraints should be analysed under antitrust laws has provoked significant debate and controversy in both the US and the EU. The different approaches adopted in each jurisdiction reflect the disparate evolution of the respective rules and differing views as to how to achieve their objectives and whether false positives or negatives are a lesser evil.

In the US the question of how vertical restraints should be appraised under section 1 Sherman Act has had a ‘tumultuous history’.⁸⁷ Hovenkamp notes:

Few areas of antitrust law have provoked more reconsideration of established rules, or more disagreement between courts and commentators, than vertical price and nonprice restraints. Like all practices, they can be governed by three possible legal rules: *per se* illegality, rule of reason analysis, or *per se* legality. Unlike most other practices, however, in this area serious arguments have been made for all three positions.⁸⁸

Although the restraints such agreements imposed on the freedom of individual traders led the courts initially to take a hostile and inflexible view of them, subjecting many to a *per se* rule of illegality, it has been seen that all but tying⁸⁹ are now subject to rule of reason analysis. Their potential for procompetitive effect has persuaded the Supreme Court that *per se* prohibition is not appropriate, even for restraints which severely limit intra-brand competition.

The Supreme Court’s decision to overturn long established precedents has not, however occurred entirely without controversy. Some commentators have been wary about the introduction of rule of reason analysis, particularly in relation to minimum RPM, and as to whether it may allow some anticompetitive vertical agreements to go unchecked (creating a risk of under-inclusive rules or ‘Type 2’ errors). They have pointed to evidence establishing that the free rider justification raised by the parties in these cases is often exaggerated, that RPM, and some other non-price intra-brand restraints, may encourage provision of an excessive and wasteful level of services leading to harm to infra-marginal consumers,⁹⁰ may be used to facilitate, encourage and/or allow collusion (explicit or tacit) between retailers or manufacturers, leads to a rise in consumer prices, weakens interbrand competition, eliminates innovative and dynamic competition from discounting retailers and/or might be used to ‘appease

concluded between US film studios and EU pay-TV broadcasters infringe Article 101, Hollywood Studios, IP/04/1314.

⁸⁷ F.M. Scherer and D. Ross, *Industrial Market Structure and Economic Performance* (3rd edn.,) (Houghton Mifflin, 1990), 541.

⁸⁸ H. Hovenkamp, *Federal Antitrust Policy: The law of competition and its practice* (West, 3rd ed, 2005), 447.

⁸⁹ See n. 38 and text.

⁹⁰ The ‘marginal consumer’, whose valuation of a product approximates to its current price, is sensitive to improvements leading to an increase in the market price of a product. He or she will purchase more of the product only if he considers that the improvement in service or quality of the product is worth the increase in its price. In contrast ‘infra-marginal consumers’ are consumers that place a value on the product substantially higher than the original price. Such consumers are relatively insensitive to increases in price. They will, therefore, not refrain from purchasing the product on an increase in price even if, in their view, the improvement in the quality of the products did not merit that increase in price, see W. Comanor ‘Vertical Price-Fixing, Vertical market Restrictions, and the New Antitrust Policy’ 98 Harv LR 983 (1984-1985)

dealer interests in excess profits or the quiet life'.⁹¹ Indeed, in *Leegin* Justice Breyer, writing for the dissenting minority, noted that US history provided empirical support for the view that RPM led to higher retail prices⁹² and that economists generally concurred on this point.⁹³ In contrast, he found no satisfactory answer to the question as to when, and how often, benefits such as the prevention of free-riding, were likely to occur⁹⁴ and considered that courts would have extreme difficulty in identifying instances in which benefits were likely to outweigh harm in rule of reason analysis.

In the EU, the Commission is also concerned that RPM may restrict competition in a number of different ways, in particular:⁹⁵ through facilitating collusion between suppliers and enhancing price transparency; by eliminating intra-brand price competition; by softening competition between suppliers and/or retailers; by preventing distributors from lowering sale prices; by lowering pressure on manufacturers' margins; by foreclosing competitors; and by reducing dynamism and innovation at the distribution level. For this reason it has concluded that RPM provisions restrict competition by object and are prohibited unless efficiencies are demonstrated by the parties. The Court has affirmed that although price competition 'does not constitute the only effective form of competition or that to which absolute priority must in all circumstances be afforded',⁹⁶ a complete elimination of price competition between dealers is restrictive of competition by object.⁹⁷ It is therefore concerned about severe restraints on intra-brand competition irrespective of the intensity of inter-brand competition on the market.

⁹¹ For discussion see e.g., P. Areeda and H. Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Applications* 35 (2004), B. Jullien and P. Rey, *Resale Price Maintenance and Collusion* (2000), P. Rey and T. Vergé, *Resale Price Maintenance and Horizontal Cartel* (2004), F. M. Scherer and D. Ross, *Industrial Market Structure and Economic Performance* (3rd edn) (Houghton Mifflin, 1990), 550, M-L. Allain and C. Chambolle, *Anticompetitive Effects of Resale-Below Cost Laws* (2007), Comanor *ibid* and T.R. Overstreet, *Resale Price Maintenance: Economic Theories and Empirical Evidence* (Federal Trade Commission Bureau of Economics staff report, Nov. 1983) (this report indicated that the more widespread practice of RPM in Europe delayed the arrival of supermarkets).

⁹² Justice Breyer stated that after the repeal of the Fair Trade Acts in the US (permitting RPM in many states), price surveys conducted by FTC staff indicated that RPM had in most cases increased the prices of products sold with RPM, Bureau of Economic Staff Report to the FTC, T. Overstreet, 'Resale Price Maintenance: Economic Theories and Empirical Evidence', 169 (1983), 551 US 877, 912 (2007).

⁹³ See, e.g., F.H. Easterbrook, 'Vertical Arrangements and the Rule of Reason' (1984) 53 *Antitrust Law Journal* 135 ('There is no such thing as a free lunch; the manufacturers can't get the dealer to do more without increasing the dealer's margin'); and amici curiae brief filed by 37 states supporting the respondent before the Supreme Court in *Leegin*.

⁹⁴ 'All this is to say that the ultimate question is not whether, but how much, "free riding" of this sort take place. And, after reading the briefs, I must answer that question with an uncertain "sometimes"', 551 US 877, 916 (2007).

⁹⁵ Vertical Guidelines, para. 224.

⁹⁶ Case 26/76, *Metro-SB-Grossmärkte GmbH v. Commission (Metro I)* [1977] ECR 1875, para. 21.

⁹⁷ See especially, Case 161/84, *Pronuptia de Paris v. Schillgallis* [1986] ECR 353, para. 25 ('provisions which impair the franchisee's freedom to determine his own prices are restrictive of competition'), Case 26/76, *Metro-SB* *ibid* ('price competition is so important that it can never be eliminated') and Case 243/83, *SA Binon & Cie v. SA Agence et Messageries de la Presse* 1985] ECR 1015, para. 44 ('provisions which fix the prices to be observed in contracts with third parties constitute, of themselves, a restriction on competition within the meaning of Article [101(1)]').

In the EU a hardline approach is also taken towards territorial restraints which shelter a distributor from all intra-brand competition and lead to the division of national markets. The Commission's vision is that eliminating these types of obstacle to free movement is necessary to achieve the maximum possible level of integration and that:

removal of non-tariff barriers is not sufficient for the full development of parallel trade, arbitrage and changes in distribution across Europe. For the complete success of economic integration it is necessary that producers, distributors and consumers, find it profitable to move towards the new market situation and not take actions to avoid or counteract the effects of the Single Market measures. The elimination of barriers to trade may not achieve its objective if producers and/or distributors introduce practices contrary to integration.⁹⁸

The Commission is extremely concerned about the significant costs of not realising the EU's single market objectives; this goal thus 'adds an extra dimension to the analysis of vertical restraints'.⁹⁹ The Commission's view is that companies should not be allowed to recreate private barriers between Member States where State barriers have been successfully abolished or to seal off territories 'hermetically . . . , making interpenetration of national markets impossible, thereby bringing to nought economic integration'.¹⁰⁰

For the complete success of economic integration it is necessary that producers, distributors and consumers, find it profitable to move towards the new market situation and do not take actions to avoid or counteract the effects of the Single Market measures. The elimination of barriers to trade may not achieve its objectives if producers and/or distributors introduce practices contrary to integration. Unfortunately in many cases it is likely that they have strong incentives to do so.¹⁰¹

Again, the case-law affirms and has generally sought to ensure that some avenues for parallel trade remain open. Vertical arrangements must not frustrate the EU objective of achieving the integration of national markets through the establishment of a single

⁹⁸ European Commission, Green Paper on Vertical Restraints in EC Competition Policy, COM(96)721, para. 78.

⁹⁹ *ibid*, 70. ('The 1992 programme was the result of a widely held conviction that the failure to achieve a single market has been costing European industry millions in unnecessary costs and lost opportunities. The exact title of the Cecchini Report, 'The cost of Non-Europe' ... is a clear reflection of this. ... Now that more steps have been taken to eliminate the remaining obstacles to the free movement of goods, services and factors of production, it is still apparent that further efforts are necessary to achieve the maximum possible level of integration ... The EC experience shows that the removal of non-tariff barriers is not sufficient for the full development of parallel trade, arbitrage and changes in distribution across Europe..). See also Z Patki, *The Cost of non-Europe in the single Market: Cecchini Revisited An overview of the potential economic gains from further completion of the European Single Market* CoNE 1/2014 European Parliamentary Research Service (Report estimating the costs arising from the lack of full achievement of the Single Market as a result of gaps and shortcomings in the areas of free movement of goods, the free movement of services, public procurement, the digital economy and consumer acquis).

¹⁰⁰ *Ninetendo* [2004] OJ L255/33, para. 338. See also R. Wesseling, 'The Modernisation of EC Antitrust Law' (Hart Publishing, Oxford, 2000) 48–49 ('Initially... [t]he antitrust rules were not more than private counterpart to the rules, enshrined in Articles 28-20 EC [the rules on free movement of goods]. The framers of the Treaty wanted to preclude private undertakings replacing the prohibited public obstacles to inter-state trade. The first period ... saw the Commission enforcing the rules with constant reference to ensuring the free flow of goods, thus promoting market integration.'

¹⁰¹ European Commission, Green Paper on Vertical Restraints in EC Competition Policy, COM(96)721, para. 70.

market. Thus ‘in principle, agreements aimed at prohibiting or limiting parallel trade have as their object the prevention of competition’.¹⁰²

In addition, in *Pierre Fabre v Président de l’Autorité de la concurrence*,¹⁰³ the Court of Justice clarified that ‘the promotion of online sales is extremely important for the internal market in Europe because it broadens the market, improves the choices for customers, and generally speaking, enhances competition’.¹⁰⁴ Generally, every distributor should be allowed to use the internet to sell its products. Online selling constitutes a form of passive (not active) selling which can be restricted only in exceptional circumstances.¹⁰⁵

4. AN APPROACH FOR ASEAN

A. Substantive Analysis: Developing a uniform antitrust analysis

The discussion above illustrates how section 1 of the Sherman Act and Article 101 have been applied to vertical agreements in the US and EU respectively. The approaches have been influenced by a number of factors, including the objectives underpinning the rules, debate over how best to achieve the objectives and the enforcement frameworks. A few general points emerge, however, which might be useful in considering how a more unified framework can be developed throughout the AMS.

First, although some vertical restraints may be especially problematic when incorporated in agreements with dominant firms (for example, exclusive dealing provisions), US and EU experience, and an established body of literature, suggests that vertical agreements do have the potential to produce anticompetitive effects even when concluded by firms which are not dominant. Were all ASEAN jurisdictions to exclude vertical agreements from their competition rules governing restrictive agreements (as is the case in Singapore and Brunei), there would consequently seem to be a severe risk that the systems would not be flexible enough to reach all potentially problematic vertical arrangements, capable of harming competition through for example, facilitating collusion on markets (especially oligopolistic ones),¹⁰⁶ foreclosing competitors and/or the penetration of new markets. Penetration of new markets, especially in other AMSs, may help businesses to reach new consumers and benefit from scale economies.

Second, if vertical agreements are to be appraised under competition laws governing anticompetitive agreements, a framework within which consistent and greater uniformity of analysis can be conducted needs to be developed. The US and EU offer two quite different visions as to how that framework might be constructed – the former suggests that given their ambiguous effects flexible rule of reason analysis is

¹⁰² Case C-501/06 P, *GlaxoSmithKline Services Unlimited (GSK) v. Commission* [2009] ECR I-9291, para. 59.

¹⁰³ Case C-439/09, ECLI:EU:C:2011:277.

¹⁰⁴ ‘Interview with Dr. Alexander Italianer, Director General for Competition, European Commission’ *theantitrustsource* April 2011, 1, 6, Vertical Guidelines, paras. 52-54

¹⁰⁵ See also the e-commerce sector inquiry, n. 86.

¹⁰⁶ This may be a particular problem in small market economies, if tight oligopolistic markets exist which might be particularly prone to collusion and may make it hard for new competitors to penetrate markets.

most appropriate whilst the latter relies more heavily on presumptions, reserving full individual Article 101 analysis for cases where the presumptions do not apply.

Third, a full and open-textured rule of reason analysis is notoriously amorphous and difficult, complex and uncertain to apply, even if limited to purely economic considerations focussing on the competitive significance of the restraint¹⁰⁷ and even in a jurisdiction with more than 120 years' experience in applying antitrust laws. In the US rule of reason cases are a daunting prospect for plaintiffs and all involved even though the Courts have sought to develop structure for it, for example, by: (i) devising short cuts to avoid full and costly analysis where anticompetitive effects are obvious (truncated analysis¹⁰⁸) or where anticompetitive effects are most unlikely (through dismissal of the case);¹⁰⁹ and (ii) by developing intermediate categories of appraisal¹¹⁰ in other cases – 'an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint.'¹¹¹

Reliance on rule of reason as the central mechanism of examination of *all* vertical agreements in the AMSs might, therefore, unless carefully structured and described in comprehensive guidelines, lead to uncertainty for business (and infringement risk) and disparate approaches by the different decision-takers (especially given the different policy objectives underpinning the separate national regimes). This would be likely to impose too great a burden both on ASEAN enforcement agencies (seeking to enforce them) and firms (seeking to comply with them). Further, there might be under-enforcement,¹¹² especially in AMSs with relatively new competition law systems where enforcers may be building experience and knowledge and/or have

¹⁰⁷ See e.g., F.H. Easterbrook, 'The Limits of Antitrust' (1984) 63 *Tex L Rev* 1, 12, T Calvani, 'Some Thoughts on the Rule of Reason' (2001) *ECLR* 201.

¹⁰⁸ As a plaintiff's task in proving anticompetitive harm through indirect evidence (by establishing the potential for genuine adverse effects on competition) involves a demonstration of market power and a showing that the agreement will create, increase or protect the market power of the parties, or facilitate its exercise and is extremely onerous, the courts have applied truncated analysis, a presumption of anticompetitive effects, in relation to obvious restraints where anticompetitive effects are apparent following a 'quick look' (*General Leaseways, Inc. v. Nat'l Truck Leasing Association* 744 F.2d 588, 595 (7th Cir. 1984), *Polygram Holding, Inc. v. Federal Trade Commission*, 416 F.3d 29, 35 (D.C. Cir. 2005)) or where 'an observer with even a rudimentary understanding of economics could conclude that the arrangements in question have an anticompetitive effect on customers and markets', *California Dental Association v. Federal Trade Commission* 526 US 756, 770 (1999). Actual or potential anticompetitive effects do not need to be demonstrated in the absence of a plausible justification being raised by the defendant

¹⁰⁹ For example, where an insufficient degree of market power is established, some courts have used market share (as a proxy for market power) as a mechanism for 'filtering-out' unmeritorious claims, see e.g., MA Patterson, 'The Role of Power in the Rule of Reason' 68 *Antitrust Law Journal* 429 (2000). In e.g., *Rothery Storage & Van Co. v. Atlas Van Lines*, 792 F.2d 210 (DC Cir 1986) Judge Bork suggested that where a defendant's share of the market was small (in that case only around 6% nationwide), that fact could be taken as indication that market power was lacking and, consequently, that it could not act anticompetitively so as to injure competition. See also *Valley Liquors, Inc. v. Renfield Importers Ltd.*, 678 F.2d 742, 745 (7th Cir. 1982).

¹¹⁰ 'The truth is that our categories of analysis of anticompetitive effect are less fixed than terms like *'per se'*, 'quick look,' and 'rule of reason' tend to make them appear.' 526 US 756, 779 (1999).

¹¹¹ 526 US 756, 781 (1999) ('The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one').

¹¹² See n. 26.

other higher priorities (such as cartel and merger investigations) pressing on their scarce resources.

Fourth, in order to provide greater legal certainty, consistency and administrability, serious consideration should be given to the question of whether application of (rebuttable) presumptions of illegality might be appropriate and/or whether safe harbours should be provided. Thus questions for reflection include:

- (a) should any presumptions of illegality be applied and, if so, which vertical agreements should be considered to be sufficiently deleterious so as to justify reliance on any such presumption? In particular:
- is a presumption against RPM sufficiently grounded in economics and/ or justified by experience in the AMSs¹¹³ to date (the different perspectives adopted by the US Supreme Court and the EU authorities on this issue have been seen)?;
 - should a presumption of illegality be applied in relation to territorial restraints, and other restraints preventing selling across borders, as a helpful, or necessary, mechanism for achieving ASEAN's market integration objective and countering attempts by firms to introduce practices contrary to it and to erect private barriers to trade?; and/or
 - should a presumption of illegality be applied to any other vertical restraint? Should there be a fixed list¹¹⁴ of restraints presumed to be incompatible with competition law and, if not, how are the parameters of the category to be determined?

In making this decision, a crucial consideration is also how any applicable presumption can be rebutted. An absolute or per se rule against conduct is more contentious to apply than a presumption which is rebuttable. In the EU, it is frequently argued that the object category can justifiably be applied more broadly than the per se rule in the US, as unlike a finding of per se illegality (which does not allow any justifications for the conduct to be raised – there is a conclusive presumption of unreasonableness), a finding that an agreement is restrictive of competition by object does not prevent an argument that the agreement satisfies the conditions of Article 101(3). It has been seen, however, that there are difficulties with this perspective, in particular as a perception has been built that object restrictions are most unlikely to satisfy the four stringent conditions of Article 101(3). The Commission has equated object restrictions with a list of hardcore restraints which it considers are both presumed to violate Article 101(1) and presumed *not* to satisfy the conditions of Article 101(3). Further, agreements have frequently been found to infringe Article 101 even where it has been vociferously argued by parties that the restraints at issue were necessary to enable a supplier to penetrate a new national market, prevent free-riding and so increase competition, consumer choice and market integration. The EU system is thus argued to be too rigid in this regard. If, in contrast, the burden on the defendant for rebutting a

¹¹³ RPM might, for example, be liable to result in acute problems in oligopolistic markets in AMS and facilitate collusion between dealers or suppliers operating on them, see n. 106.

¹¹⁴ In the EU, the category of object restraints is not fixed but includes all agreements whose content and context reveal in themselves a sufficient degree of harm to competition law. An important issue which has consequently arisen is whether the category might encompass some 'newer' vertical business practices, in particular ones which may resemble RPM such as price relationship agreements, contracts that reference rivals or most favoured nation clauses (MFNs).

presumption of illegality was less onerous and, if on proof of a procompetitive justification, account was taken of the relative actual or likely anticompetitive effects of the arrangement in the assessment, the scope of the object category, and the presumption of illegality that follows from its application, might not be quite so contentious.

An extremely important issue, therefore, is how rebuttal of any presumption of illegality can be accommodated within the legal system of each AMS. Because of the propensity of *all* vertical agreements to produce efficiencies, it would seem inappropriate to apply absolute rules against them. Rather there should be credible opportunities for defendants to justify their arrangements and, where a justification is raised, a realistic framework for balancing the anti- and procompetitive aspects of the agreement.

- (b) Should safe-harbours be applied, for example, for arrangements concluded between firms with low markets shares and where, consequently, it is unlikely that the parties will have sufficient market power to harm competition on the market? In the US, courts are likely to dismiss complaints where anticompetitive effects are improbable, frequently because the defendant(s) lacks market power.¹¹⁵ In the EU it has been seen both that the *de minimis* principle and the block exemption regulations may operate as safe harbours where certain conditions, including market share thresholds, are satisfied, but only where the agreement does not contain object or hardcore restraints. The benefit of the Verticals Regulation can, however, be withdrawn prospectively (by the Commission or an NCA) where it can be demonstrated that the agreement does in fact infringe Article 101 – perhaps because the arrangements facilitate collusion at the supplier or retailer level.¹¹⁶

Fifth, it is vital that coherent guidance be provided not only as to when presumptions/ safe harbours apply and can be rebutted or withdrawn, but as to how the law applies in situations where such presumptions/ safe-harbours are not applicable – where fuller ‘rule of reason’ style or effects analysis is to be conducted. This could be achieved through ensuring that national legislation provides sufficient clarity, guidance is issued and both are *supplemented* by reasoned decision-taking (by competition agencies and/or courts) illustrating how individual analysis in relation to different types of vertical agreement is structured. Effective enforcement is essential to ensure that application of the law is clarified.

B. Achieving Convergence and Effective Enforcement of the Harmonised Framework

Even if consensus around an appropriate approach for ASEAN can be settled on and articulated (perhaps in fleshed out Guidelines on Vertical Restraints which are more specific than the general regional guidelines on competition policy), a challenge will be to achieve that objective in the ASEAN way.

In the EU effective enforcement and significant consistency in approach in the application of EU, and national, competition law has been achieved principally as a result of the principles of direct effect and supremacy of EU law. EU’s unique legal system means that Articles 101 and 102 have direct effect in each Member State - they bind not only the States, but private individuals without implementation in the national system. These rules can thus be enforced publicly by a network of

¹¹⁵ See n. 109 and text.

¹¹⁶ See n. 80 and text.

competition agencies (the Commission and NCAs) and privately by the national courts. A degree of consistency in approach between the disparate decision-takers (Commission, NCAs and national courts) is ensured as the ultimate interpreter of the Treaties (and Articles 101 and 102) is the Court of Justice. National courts and NCAs thus apply EU law taking heed of the case-law of the EU Courts and giving it precedence over conflicting national law.¹¹⁷ Although NCAs are now playing an increasingly important role in the enforcement process, especially in the area of vertical restraints, if national enforcement leaves gaps, or creates uncertainty or an unacceptable risk of conflicting interpretations of EU law, the Commission can intervene in a case and deprive NCAs of jurisdiction over the matter.¹¹⁸

Further, although NCAs and national courts can apply their own national competition laws concurrently with Article 101,¹¹⁹ they must also apply EU law to conduct which affects trade between Member States. The principle of supremacy demands that EU law prevail over any conflicting national law. As national authorities cannot rely on national law either to authorise conduct prohibited by Article 101 or to prohibit conduct authorised by Article 101, a high level of convergence between EU and national law governing agreements is demanded.¹²⁰

In ASEAN, in contrast, there is no supra-national law or enforcement agency and only national enforcement of distinct systems of national competition law, set within countries with diverse economic conditions. Convergence can thus be achieved only through cooperation and consensus building. A quick glance at the legislation governing vertical agreements in the ASEAN jurisdictions illustrates achieving greater uniformity of approach will not be easy: some have competition regimes modelled to different extents on EU or US law, others have regimes with fair trade or other socio-political elements mixed in;¹²¹ some, but not all, specify object or per se infringements; some, but not all, provide for exemptions or exclusions from main prohibitions; some, but not all, operate a notification system; and all of the jurisdictions have different social, economic, political and industrial makeups which make accord taxing. More specifically in relation to vertical agreements, it has been seen that some regimes treat vertical agreements by non-dominant firms as legal per se, some treat agreements containing certain vertical restraints as illegal per se and others shed little light on how it applies to vertical agreements. In order to achieve convergence around an agreed framework and greater clarity changes to primary legislation are thus likely to be desirable in at least a few of the individual AMSs.¹²²

¹¹⁷ Article 267 TEFU provides a mechanism for national courts and tribunals to refer questions to the Court of Justice where the interpretation of EU law is unclear.

¹¹⁸ Reg. 1/2003, Art 11(6).

¹¹⁹ The EU has exclusive competence over competition law only in so far as it is necessary for the establishment of an internal market (TFEU, Art 3(1)(b)). Exclusive competence means that only the EU may legislate and adopt legally binding acts unless it empowers Member States to do so (see Treaty on European Union (TEU), Art 2(1)).

¹²⁰ Reg 1/2003, Art 3. Even though many Member States have national competition laws which mirror EU law, and which are interpreted in line with them, these requirements minimise the risk of conflict. Broadly national law may deviate from the principles set out in Article 101 only in relation to conduct which does not affect trade between Member States.

¹²¹ See Chap. ***.

¹²² Eg, Singapore and Brunei would need to remove the exclusion for vertical agreements from laws governing anticompetitive agreements so bringing them within the scope of the law. The Guidelines

In addition, depending on the exact approach around which consensus is built, in each jurisdiction it will need to be considered whether, and if so how:

- (i) *Presumptions of illegality can be applied within the national framework.* This is likely to be relatively straightforward for ASEAN regimes that utilise wording similar to the EU prohibition, referring to agreements which restrict competition by object or effect.¹²³ Further, although at first sight the per se/rule of reason dichotomy utilised in the US does not seem to allow for presumptions to be applied (rather conduct is prohibited per se or analysed more fully under the rule of reason), in practice US courts have used presumptions and burden shifting within the rule of reason framework. Truncated analysis (for cases displaying obvious anticompetitive effects) has not, however, been used by US courts to date in vertical cases, but only in certain horizontal collaboration cases.¹²⁴
- (ii) *(Any) presumptions of illegality can be rebutted.* It has been seen that if presumptions are to be applied in vertical restraint cases, there should be realistic opportunities for firms to rebut them; otherwise the conclusion of procompetitive agreements may be deterred. Further, that a problem with the Article 101 structure is that it is very difficult for firms to justify agreements found to be restrictive of competition by object under Article 101(3). Many AMSs have the power to grant exemptions, and it will be interesting to see whether and if so how these are exercised.¹²⁵ In others, however, (such as Indonesia and Lao) there is no or limited opportunity for exemption.¹²⁶ Unless greater scope for exemption is provided for in these latter jurisdictions, application of presumptions may result in the utilisation of over-inclusive rules and Type 1 errors.
- (iii) *Safe harbours can be applied.* The application of safe harbours may be a useful mechanism for ensuring that a cluster of vertical agreements which are likely to be unproblematic from a competition perspective generally fall outside of the scope of the rules. Their use seems to be possible in a number of ASEAN jurisdictions which provide either for the adoption of block exemptions,¹²⁷ the application of appreciability or de minimis principles¹²⁸ or

on Developing Core Competencies in Competition Policy and Law, n. 16, envision that the evolution of a competition enforcement system will require a period of significant statutory revisions, based on experience acquired, to overcome its limits and shortcomings, see Part 1.3.

¹²³ See e.g., Singapore (although vertical restraints are currently excluded, see n. 18) and Malaysia Competition Act, Chapter 1 prohibition, section 4 (the Guidance states that RPM is likely to be found anticompetitive and that the MyCC will take a strong stance against it)

¹²⁴ See n. 108 and text. Courts have perhaps been reluctant to rely on quick look analysis or demonstrated actual effects in the context of vertical agreements because of the potential of such agreements to restrict output in the short term with the objective of increasing it in the long term

¹²⁵ See e.g., Singapore (net economic benefit test), Malaysian Competition Act 1910, s 5 and Myanmar Competition Law, 24 February 2015, s 15.

¹²⁶ See e.g., Indonesian Law No 5/1999, Art 50.

¹²⁷ See e.g., Singapore and Malaysia.

¹²⁸ See e.g., Malaysia where only agreements which significantly restrict competition on a market in Malaysia are caught (which have a non-trivial impact). Non-price vertical agreements may be considered to have an insignificant effect if the individual market share of the seller or buyer does not exceed 25% of their relevant market (See Guidelines on the Enforcement of the Chapter I prohibition, paras. 3.3, 3.4 and 3.17) and Singapore.

for the exclusion of certain vertical agreements where the parties market shares do not exceed specified thresholds. Where such techniques are not available, mechanisms could be developed in the jurisprudence for authorising agreements or summarily dismissing or rejecting cases where the parties' market shares are not sufficient to create competition law problems on the market.

- (iv) *Guidance and clarity of policy can be developed.* Reasoned decision-taking is a crucial mechanism for clarifying the law and for elucidating how a coherent framework for analysis is to be structured and developed in cases where presumptions do not apply and/or how presumptions are to be rebutted. For example, how proof of actual or likely anticompetitive effects and a theory of harm can be established in relation to specific type of restraint sufficient to shift the evidential burden to the defendant, what efficiencies or benefits can be relied upon to counter a prima-facie finding of anticompetitive effects and how the competing effects can be balanced or weighed against each other. As a number of the AMSs operate notification systems (for example, Singapore, Malaysia, Viet Nam and Thailand) there is scope for these authorities to adopt both infringement and non-infringement decisions and so to decide cases which will operate as essential guidance in future cases.
- (v) *Competition agencies: cooperation and coordination.* An ASEAN Competition Network and/or the ASEAN Experts Group for Competition could provide a forum in which to develop policy consensus, ensure uniformity in interpretation (in so far as feasible), to deal with cross-border matters and to ensure that conduct in one AMS which harms competition in another¹²⁹ or infringes ASEAN objectives (for example, where an agreement in one AMS prevents the parties from selling into another) does not go unchecked. The EU model demonstrates that it is not always easy or possible to achieve consistency within a network of competition authorities even where there is a central competition law, active cooperation between the authorities and where they are applying the same law. Regular meetings between agencies to facilitate a coordinated approach will therefore be necessary and to ensure cooperation and information sharing in cases with cross-border effects.¹³⁰

5. CONCLUSIONS

The AMSs currently adopt divergent policies towards vertical agreements which may be creating both enforcement gaps which allow anticompetitive agreements to go unchecked and uncertainty which is deterring the conclusion of some procompetitive distribution arrangements. Pursuing a more consistent policy might help both to deter anticompetitive distribution arrangements and encourage pursuit of efficient

¹²⁹ In addition to the question of how one AMS will enforce its law against businesses in another AMS, the jurisdictional reach of each of the AMS's competition laws will thus be important (see e.g., the Singapore Competition Act, section 35, which gives the Commission explicit extra-territorial jurisdiction in relation to conduct which harms competition in Singapore). In the EU, an important issue is whether a 'qualified effects' doctrine should be adopted; that is, Articles 101 and 102 should apply where conduct has a direct, substantial and reasonably foreseeable consequences within the EU. The Court of Justice has so far not had to rule on this issue, but the question has been raised directly before it in *Intel*, Case C-413/14P, appeal from the General Court's judgment in Case T-286/09, EU:T:2014:547.

¹³⁰ See further Chap. ***.

distribution practices which would benefit welfare, facilitate market integration and allow businesses to adopt more uniform distribution policies throughout the AMS. This may promote competition and help to realise the benefits from increased trade between AMSs.

Achieving greater harmonisation will require acceptance that the process will help achieve ASEANs goals (particularly the single market objective), commitment and close cooperation between agencies to ensure coordination and elucidation of policies within their legislative frameworks, as well as mechanisms to achieve consistent application of the law and collaboration in individual cases, especially those with cross-border effects. This will require extensive work, not least to agree on a consistent policy to pursue, which may demand legislative amendments in some AMSs. This paper has, drawing on the enforcement experience of the US and the EU, and seeking to avoid some difficulties experienced in those jurisdictions, set out some proposals about how thinking could be developed to achieve consensus around development of a single policy within ASEAN. It requires close consideration of a number of issues, particularly how lessons learnt from the US and EU can be used to mould a coherent and clearly articulated policy which is optimal to achieve ASEAN objectives and which can be implemented effectively in each AMS.